89-1887

(1)

No. _____

Supreme Court, U.S.
FILED
MAY 29 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1989

THE STATE OF TEXAS,
Petitioner,

v.

CLARENCE LEE BRANDLEY,
Respondent.

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the court below erred under *Teague v. Lane*, 489 U.S. ___, 109 S.Ct. 1060 (1989), in announcing on collateral review a new rule of federal constitutional law and giving it retroactive effect in this case.

II. Whether the Due Process Clause imposes upon the State an obligation to conduct an investigation that does not focus solely on the accused to the exclusion of other suspects or leads, regardless of the fact that the evidence available to law enforcement authorities points overwhelmingly to the accused.

III. Whether the Texas Court of Criminal Appeals, on the facts of this case, failed to apply or misapplied the materiality test established by this Court in the area of "constitutionally guaranteed access to evidence."

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Petitioner herein, by and through its attorney, the District Attorney for the Ninth Judicial District of Texas, and files this *Petition for Writ of Certiorari*.[1]

OPINIONS BELOW

The opinion of the Texas Court of Criminal

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[1]For clarity, the Petitioner is referred to as "the State," and Respondent as "Brandley."

Appeals granting Brandley's second application for writ of habeas corpus, reversing his conviction, and remanding for a new trial is attached hereto as Appendix A. *Ex parte Brandley*, 781 S.W.2d 886 (Tex. Crim. App. 1989). The State's Motion for Rehearing was denied without written order on January 17, 1990, and a copy of the State's notification of this disposition is attached hereto as Appendix B. The order of the Court of Criminal Appeals denying Brandley's first application for writ of habeas corpus is attached to the petition as Appendix E. The opinion of the Texas Court of Criminal Appeals affirming Brandley's conviction on direct appeal is attached as Appendix D. *Brandley v. State*, 691 S.W.2d 699 (Tex. Crim. App. 1985).

JURISDICTION

The opinion of the Texas Court of Criminal Appeals was delivered on December 13, 1989 (Appendix A). A timely filed Motion for Rehearing was denied on January 17, 1990 (Appendix B). This petition for writ of certiorari is timely filed pursuant to the Order entered May 16, 1990, granting an extension of the ninety (90) day time period provided for by Rule 13.1 of the Rules of the Supreme Court, up to and including May 28, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law

> which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

Brandley was indicted, in Cause No. 14,666, for the capital murder of Cheryl Fergeson. Trial was held in the 221st District Court of Montgomery County, Texas. Brandley's first trial ended in a mistrial when the jury was unable to reach a verdict. A second trial resulted in Brandley's conviction of the capital offense, and the death penalty was assessed. On direct appeal the Texas Court of Criminal Appeals affirmed Brandley's conviction holding, among other things, that the evidence was sufficient to sustain the conviction. *Brandley v. State*, 691 S.W.2d 699 (Tex. Crim. App. 1985) (Appendix D).

Brandley then filed an application for writ of habeas corpus, pursuant to Article 11.07, Texas Code of Criminal Procedure, contending that there was newly discovered evidence, that the State purposely excluded all blacks from the petit jury, that the State withheld favorable evidence, that there was jury misconduct, and that three jurors were improperly excused. Following an evidentiary hearing the trial court concluded that none of the grounds had merit, and the Texas Court of Criminal Appeals agreed, denying Brandley's application for writ of habeas corpus in a *per curiam* unpublished order. *Ex parte Brandley*, No.

9691-02 (Tex. Crim. App. -- December 22, 1986) (*en banc*) (Appendix E).

A second application for writ of habeas corpus was filed on March 20, 1987, asserting six grounds for relief. Each of these grounds was based exclusively on the federal constitution. On June 30, 1987, the Texas Court of Criminal Appeals ordered the trial court to conduct an evidentiary hearing and to submit findings of fact and conclusions of law. A special judge was appointed to preside over the post-conviction proceeding, and in compliance with the order of the Court of Criminal Appeals, the habeas court conducted a ten day long evidentiary hearing. On November 19, 1987, the Court of Criminal Appeals received the habeas court's findings of fact and conclusions of law, despite the fact that the habeas court did not yet have access to the hearing record.[2] The court reporter completed transcription of the evidentiary hearing record on November 30, 1987, some *eleven (11) days* after the habeas court entered its findings. The Texas Court of Criminal Appeals ordered both parties to file briefs on the merits. On January 18, 1988, oral argument was heard, and the writ submitted on just three of the original six grounds for relief. The Texas Court of Criminal Appeals issued its opinion granting Brandley a new trial on December 13, 1989, holding that Brandley was entitled to relief under the Due Process Clause of the Fourteenth Amendment of the United States Constitution on only one of the original grounds for relief, that being:

> The pretrial investigative procedures utilized by the State were so impermissibly

[2]This is borne out by the fact that the habeas court's findings did not include a single citation to the record from the evidentiary hearing. Similarly, the habeas court made no reference to the record from either of Brandley's trials.

> suggestive of the Petitioner that it created false testimony calculated to manufacture circumstantial evidence against Petitioner in violation of his constitutional rights to due process of law and a fundamentally fair trial.

The majority opinion of the Texas Court of Criminal Appeals did not address the other two grounds for relief which had been argued and submitted, although they were fully addressed and rejected by Judge Campbell in his dissent. The majority opinion did not rely in any respect on state law grounds. The State's Motion for Rehearing was summarily denied on January 17, 1990 (Appendix B).

B. Statement of Facts

On Saturday, August 23, 1980, at 9:10 a.m., Cheryl Dee Fergeson, the sixteen-year-old manager of the Bellville High School girls' volleyball team, arrived with her teammates at Conroe High School for a scrimmage. Shortly after her arrival at an annex gym with the team, Cheryl left the gym. Some two hours later, her nude body was found in a loft area of the school auditorium. She had been strangled and raped.

The State's testimony showed that Gary Acreman, Henry Peace, Sam Martinez, and John Sessum were janitors at the high school. All the janitors, except Sessum, who was not called as a witness, testified that they had arrived at the school at about 7:30 a.m. About ten minutes later, Clarence Brandley, their supervisor, arrived and unlocked the doors to the main building to let them in. He directed all the janitors, except Peace, to set up chairs in the cafeteria; Peace was sent to buff the floor in the teachers' lounge. Acreman, Sessum and Martinez

finished their work some time between 9:00 and 9:30 and went to wait in the hallway between the cafeteria and the auditorium for Brandley to come and give them their next assignment. While waiting there, a girl matching Cheryl Fergeson's description approached from the direction of the gym and entered the ladies restroom which was situated on a landing off the hallway. A door which accessed the auditorium and the loft was on the same landing.

Several minutes later, Brandley approached. He had several rolls of toilet paper in his hands. As Brandley started up the stairs to the restroom, Acreman told him there was a girl in the restroom. Saying he wasn't going in the girls' room, Brandley told the janitors to go find Peace and to go across the street to the vocational building and meet him there. Since Brandley was the only one present who had any keys to the high school, the four janitors waited for Brandley on the lawn outside. Approximately forty-five minutes went by until Brandley appeared at a door to the main building and told Peace to come over and get the keys. The janitors set up chairs in the vocational building for somewhere between thirty and sixty minutes, then Brandley reappeared and sent all of them, but Peace, home.

Peace and Brandley went back to the main building. After a short while they heard people calling for Cheryl. Brandley told Peace they should help look for her. Peace noticed that two doors to the auditorium, which testimony established had been locked the previous evening, were now open. Brandley told Peace to go look in the loft. When Peace found nothing, Brandley told him to go back up and "look real good." Again, Peace found nothing. After looking in some other places for a while, Brandley sent Peace to the loft a third time to "look real good," this time accompanying

Peace. This time, Peace found Cheryl's body, hidden behind a piece of plywood.

The autopsy revealed that Cheryl had been strangled and raped. Her bladder was empty, indicating she had just urinated. The strangulation mark on her neck measured 1 1/4 inches in width, exactly matching Brandley's belt in size. Cheryl's clothes were found in a dumpster the following Monday, in a plastic garbage bag like the ones used at the high school. A mop string was found with the clothes. Various hairs were recovered from the crime scene and Fergeson's clothes. The only hairs that had been forcibly removed, thus having more significance to the investigation, were negroid in origin. According to a defense expert, these hairs were "identical in all observable characteristics to Brandley's." None of the hairs was similar to Peace's. Tests conducted on semen stains on Cheryl's clothing revealed the presence of blood group factors A and H. As Cheryl was a type "A" secretor, this finding is consistent with the attacker having either type "A" or type "O" blood. Brandley's blood was type "O."

Assessing this evidence on direct appeal, the Court of Criminal Appeals held that "[n]o reasonable hypothesis is presented by the evidence to even *suggest* that someone other than [Brandley] committed the offense." *Brandley v. State*, 691 S.W.2d 699, 704 (Tex. Crim. App. 1985) (emphasis in original) (Appendix D at D-8).

REASONS FOR GRANTING THE WRIT

I.

THERE ARE SPECIAL AND IMPORTANT REASONS TO GRANT THE WRIT.

Rule 10 of the Rules of this Court provides that "review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." An irreconcilable conflict between the decision of a state court of last resort and the decision of another state court of last resort or a federal court of appeals is a well established ground for granting certiorari, *e.g.*, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 753 n.1 (1985), as is the resolution by a state court of last resort of a federal question in a manner that conflicts with pertinent decisions of this Court. Both circumstances are present here.

A. Certiorari should be granted because the decision of the court below contravenes this Court's decisions regarding constitutionally guaranteed access to evidence.

The court below has imposed upon the State a broad and unprecedented due process obligation to perform an investigation that pursues every lead, conducts all conceivable scientific tests, and preserves all evidence, even though the evidence available to the police points only to the accused. The Court of Criminal Appeals found error under the Due Process Clause of the Fourteenth Amendment without reference to whether information not provided to the defense was materially favorable to Brandley under *United States v.*

Bagley, 473 U.S. 667 (1985), and *United States v. Agurs*, 427 U.S. 97 (1976). The Court of Criminal Appeals likewise found that the loss of certain physical evidence violated Brandley's due process rights, even though Brandley did not show, and the court did not find, the bad faith required by *Arizona v. Youngblood*, 488 U.S. ___, 109 S.Ct. 333 (1988). Further, the court below determined that the entire investigation was impermissibly suggestive because the police did not pursue all leads that might have led to evidence favorable to Brandley, even though the information available to the police overwhelmingly inculpated Brandley.

Purporting to apply a totality of the circumstances test, the Court of Criminal Appeals combined various due process theories, no one of which would entitle Brandley to relief, and found due process error without the requisite showing of materiality or bad faith. In so doing, the court below created a new rule that eliminates precisely those elements that properly limit the reach of due process to cases involving the denial of a fundamentally fair trial. The decision of the court below contravenes the precedent of this Court; at best, the decision amounts to glaring error of federal constitutional law.

B. Certiorari should be granted to resolve an irreconcilable conflict that exists among various state courts of last resort and federal courts of appeals involving an important and recurring issue of constitutional law.

The holding and reasoning of the Court of Criminal Appeals is at odds with the decisions of numerous state courts of last resort that have adopted, interpreted, and applied this Court's decision in *Brady*

v. Maryland, 373 U.S. 83 (1963), and its progeny, as well as *Arizona v. Youngblood*, 488 U.S. ___, 109 S.Ct. 333 (1988).[3] Some state courts hold that the rights guaranteed an accused by the Due Process Clause of the Fourteenth Amendment do not include a requirement that the State exhaust every possible lead or conduct certain scientific tests. *E.g. Siglar v. State*, 541 N.E.2d 944 (Ind. 1989). The remaining cases hold that, absent a showing of bad faith or materiality, the inadvertent loss or destruction of evidence does not constitute a deprivation of any right guaranteed an accused by the Due Process Clause. *E.g. State v. Seifert*, 557 A.2d 494 (Vt. 1989). For example, in *Commonwealth v. Troy*, 540 N.E.2d 162 (Mass. 1989), a defendant charged with first degree murder submitted his blood for testing at a state laboratory, claiming that test results would show a high level of drugs and thus support his intoxication defense. The sample was carelessly destroyed prior to testing. In applying the materiality criterion mandated by *Youngblood* and its predecessors, the Massachusetts Supreme Court held that to establish a due process violation, a defendant must demonstrate "a reasonable possibility based on concrete evidence rather than fertile imagination that access to the evidence would have produced evidence favorable to his cause." *Troy*, 540 N.E.2d at 167. Because the defendant was convicted only of general intent crimes, to which intoxication was not a defense, he could not meet this burden. Similarly, the decision of the court below does not coincide with any decisions of the federal courts of appeals that have considered claims such as Brandley's since this Court's decision in *Youngblood*. For instance, in *Miller v. Vasquez*, 868 F.2d 1116 (9th

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[3]Attached hereto as Appendix C is a list containing summaries of various decisions of state courts of last resort and federal courts of appeals applying the principles and analysis set forth by this Court in *Youngblood*.

Cir. 1989), a habeas corpus petitioner claimed that his due process rights were violated by the state's failure to collect, preserve and test the assault victim's blood-stained jacket and to photograph his scratched arms. The court held:

> [s]ince, in the absence of bad faith, the police's failure to *preserve* evidence that is only potentially exculpatory does not violate due process, then a fortiori neither does the good faith failure to *collect* such evidence violate due process.

Id. at 1120 (emphasis in original).

The holding in the instant case, that the failure of the police to follow certain supposed leads or to perform certain scientific tests violates a defendant's due process rights, is in direct conflict with the cases cited in Appendix C. Review by this Court is therefore necessary to resolve this conflict and allow for a uniform interpretation and application of the Due Process Clause to claims relating to police investigation and scientific testing of physical evidence.

II.

THE COURT BELOW ERRED IN FINDING A DUE PROCESS VIOLATION BASED ON A DENIAL OF CONSTITUTIONALLY GUARANTEED ACCESS TO EVIDENCE.

A. None of the factors identified by the Court of Criminal Appeals, in finding a due process violation, are "material" in the constitutional sense.

This Court has consistently limited the area of "constitutionally guaranteed access to evidence" to evidence that is material to the defense. *United States v. Valenzuela-Bernal*, 488 U.S. 858, 867 (1982). Thus, a prosecutor is not required to deliver his entire file to the defense but, rather, must disclose only favorable evidence that is material to issues of guilt or punishment. *United States v. Bagley*, 473 U.S. 667, 674-75 (1985); *United States v. Agurs*, 427 U.S. 97, 112-13 (1976). "[E]vidence is material *only* if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. at 682 (emphasis added). A reviewing court's assessment of the materiality of evidence not provided to the defense must be made "in light of the totality of the circumstances and with awareness of the difficulty of reconstructing in a post trial proceeding the course that the defense and the trial would have taken had the defense been given access" to the evidence. *Id.* at 683.

Similarly, the government's duty to preserve evidence is limited to evidence that is material. In this

context, the materiality criterion is couched in terms of "bad faith." *Arizona v. Youngblood*, 488 U.S. ___, ___, 109 S.Ct. 333, 337 (1988). To implicate due process guarantees, the unpreserved evidence must "possess an exculpatory value that was apparent before the evidence was destroyed," *California v. Trombetta*, 467 U.S. 479, 488-89 (1984), and the existence of "bad faith" hinges on police knowledge of the exculpatory value. *Youngblood*, 488 U.S. at ___ n.**, 109 S.Ct. at 336 n.**.

It is clear that the Court of Criminal Appeals not only failed to apply properly these firmly established principles, but failed to apply them at all.[4] In the present case, the court below summarized its holding as follows:

> Although any of these incidences alone might not support applicant's claim, there can be no doubt that the cumulative effect of the investigative procedure, judged by the totality of the circumstances, resulted in a deprivation of applicant's right to due process of law by suppressing evidence favorable to the accused, and by creating false testimony and inherently unreliable testimony. Accordingly, applicant's conviction must be reversed.

Ex parte Brandley, 781 S.W.2d 886, 894 (Tex. Crim. App. 1989) (Appendix A at A-18-19). Nowhere does the majority apply a materiality test under *Brady* or *Youngblood*. Moreover, as set forth in great detail in

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[4]Indeed, the majority chides the dissent for evaluating the habeas court's findings in light of the entire record, *Ex parte Brandley*, 781 S.W.2d at 888 n.1 (Appendix A at A-3), although that is what this Court's decisions require, *United States v. Bagley*, 473 U.S. at 683.

Presiding Judge McCormick's dissenting opinion, the factual findings underlying the majority's conclusion are clearly erroneous in light of the record. *Id.* at 896 (McCormick, P.J., dissenting) (Appendix A at A-22). Nonetheless, even accepting those findings as accurate, none of the factual circumstances upon which the majority relied are material in the constitutional sense.

The Court of Criminal Appeals relied upon the following facts to supports its conclusion:

1. Texas Ranger Wesley Styles arrested Brandley prior to initiating his investigation. *Id.* at 888 (Appendix A at A-4).

2. A "walk-through" conducted by Ranger Styles with three janitors other than Brandley may have induced those witnesses to alter their stories so that they would coincide. *Id.* at 893 (Appendix A at A-16).

3. The State failed to disclose to the defense that Ranger Styles intimidated janitor Peace, and police did not pursue a "lead," provided by Peace, that janitor Acreman informed him that he [Acreman] saw Brandley having fun with a good looking girl. *Id.* at 894 n.8, 891 (Appendix A at A-11).

4. The State failed to obtain, and resisted defense efforts to obtain, hair and blood samples from white janitors. *Id.* at 890 (Appendix A at A-8-9).

5. The State failed to analyze, and allowed the destruction of, semen samples collected by the medical examiner during autopsy. *Id.* at 890 (Appendix A at A-9-10).

6. Police failed to pursue a "lead" provided by Cheryl Bradford, that she saw two white men hurriedly walk through the school gymnasium and leave the building, and did not disclose such information to the defense. *Id.* at 891-92 (Appendix A at A-10-11).

The foregoing circumstances, whether considered individually or cumulatively, fall far short of satisfying the materiality criterion required in "access to evidence" cases. First, the circumstances surrounding Brandley's arrest do not even remotely suggest a "blind focus" in investigation. Ranger Styles entered the case to assist an ongoing investigation, and he arrested Brandley under the authority of an arrest warrant, issued by a magistrate whose neutrality is not questioned. The warrant issued on the basis of information obtained by other law enforcement officials, through procedures not questioned by Brandley, that included Brandley's admission that he was the only person who had access to the locked area of the school in which the victim's body was found.

Second, the "walk through" is not probative of an improper investigation of the crime. Any question regarding the "suggestiveness" of the "walk through" is dispelled by the record in this case. The three janitors who "walked through" the high school with Ranger Styles, showing him where they had been at times pertinent to the investigation, had given written state-

ments to Conroe police five days before the "walk through" and before Ranger Styles had any involvement in the investigation. No complaint has ever been made that these statements were taken under coercive or otherwise improper circumstances. Following the "walk through," each janitor gave an additional written statement to Conroe police officers.[5] No claim is made, nor does the record support an inference, that the contents of the post-"walk through" statements of Acreman and Martinez were the product of improper influence by any law enforcement officials.

The basic difference between the two sets of statements is that the statements taken after the "walk through" are longer and more detailed than the initial ones. Certainly, there is no significant inconsistency between the pre- and post-"walk through" statements of any of the three janitors such as would suggest, let alone establish, that the walk-through procedure was "so unnecessarily suggestive and conducive to irreparable mistaken identification" or testimony as to violate due process. *See Stovall v. Denno*, 388 U.S. 293, 302 (1967).[6] Significantly, all of the statements are consis-

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[5]Both the pre- and post-"walk through" statements are set out *verbatim* in Judge Campbell's dissenting opinion. *Ex parte Brandley*, 781 S.W.2d at 918-23 (Campbell, J., dissenting) (Appendix A at A-83-89).

[6]Although one janitor, John Sessum, claimed at the evidentiary hearing that Ranger Styles threatened him with arrest if he did not cooperate, he made no claim that Ranger Styles or anyone else associated with the police or prosecution asked or told him to lie or to tell anything other than the truth. There is no evidence in the record that, prior to March of 1987, Sessum told anyone, let alone responsible law enforcement agencies, the version of events he related at the post-conviction evidentiary hearing. Further, as with the other janitors involved, Sessum's statements to police during the investigation were consistent with those of the other janitors, including Brandley. In any event, Sessum did not

(footnote continued on next page)

tent in every material respect with Brandley's own version of the events, as detailed in his written statement, grand jury testimony, and testimony at his first trial, the truthfulness of which is not challenged by Brandley. Furthermore, each of these statements was made available to the defense for purposes of cross-examination during Brandley's trial. The defense was free to exploit any inconsistency it felt was significant or, conversely, to exploit consistencies it felt established evidence of "coaching." There is, thus, no factual support for the majority's legal conclusion that the walk through somehow produced "irreparably mistaken" testimony.

Third, even if janitor Peace's claim that he was intimidated and abused by Ranger Styles is true, this circumstance is not material in the constitutional sense. The unrefuted record shows that Peace told Ranger Styles the same facts that he disclosed in his prior statement to the Conroe police and in his testimony at Brandley's trial. Even at the evidentiary hearing conducted during state habeas proceedings, Peace maintained that his prior statements and testimony were true.[7] Although Ranger Styles' conduct,

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testify at Brandley's second trial, which resulted in his conviction, and thus the alleged intimidation by Ranger Styles could not possibly have affected the outcome of Brandley's trial.

[7]Only by bootstrapping the habeas court's acceptance of newly discovered evidence, in the form of the recanted testimony of janitors Sessum and Acreman (the latter of whom recanted his recantation), does the majority reach its apparent conclusion that Peace's testimony must also have been perjured. The record, however, simply does not support a conclusion that Ranger Styles may have caused this to happen, if it did. The majority also suggests that the State "knowingly used perjured testimony" of Peace during the trial, although this claim was never raised by Brandley, and the record is devoid of any evidence that any law enforcement

(footnote continued on next page)

if true, is deserving of condemnation, as found by both the majority and the dissent, Brandley has not and cannot demonstrate a reasonable probability that the outcome of his trial would have been different had that conduct been exposed to the jury. Indeed, the majority opinion did not pretend to make such a finding.

Moreover, Peace's statement to Ranger Styles, that Gary Acreman reported seeing Brandley "having fun with a good looking girl," is certainly not materially favorable to the defense. This information is plainly inculpatory, not exculpatory of Brandley, as it represents an apparent eye witness account of the onset of the very crime for which he was convicted. Furthermore, the record of the trial reflects that the defense was provided with a copy of Ranger Styles' offense report for purposes of cross-examination, that the report contained an account of the statement by Peace, and that the defense, wisely, chose not to inquire into this area.

Fourth, no due process error was occasioned by the failure of the police to obtain, and the prosecutor's resistance to defense efforts to obtain, hair samples from the other janitors who were present in the high school on the date of the murder. According to Brandley, as related in his sworn testimony, those janitors were not in the building when Cheryl Fergeson was killed, and there was no probable cause or even reasonable suspicion that any one of the other janitors participated in the offense. A number of hairs and hair fragments, caucasian and negroid, were found on the

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(footnote continued from previous page)
officials or prosecutors knew of the alleged perjury. Judge Campbell's dissenting opinion, however, thoroughly demonstrates the invalidity of this suggestion. *Ex parte Brandley*, 781 S.W.2d at 924 n.12 (Campbell, J., dissenting) (Appendix A at A-96-97).

deceased's body and on her clothing. The only hairs that had been forcibly removed, and which were therefore pertinent to the investigation, were negroid and matched Brandley's hairs. A hair sample was obtained from Peace, as he was apart from the other janitors during part of the morning that the crime occurred and he discovered the body. Peace was excluded as a possible donor. The presence of caucasian hair does not in any way exculpate Brandley but, at best, suggests that Brandley was not the sole participant in the rape and murder of Cheryl Fergeson.

Fifth, the destruction of vaginal swabs containing semen samples cannot possibly have denied Brandley access to constitutionally material exculpatory evidence. The swabs, taken from the deceased during autopsy, were not destroyed by Montgomery County officials but by the Harris County Medical Examiner's Office during the regular course of its business; the Medical Examiner testified that material on the swabs would not have been available for further testing because it was consumed during the tests that his office did perform.[8] Although the swabs were not tested for the presence of factors that can identify the blood group of the donor of spermatozoa, other physical evidence was subjected to such testing; the results of those tests did not exculpate Brandley. Specifically, semen stains were recovered from the

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[8]Slides were made utilizing material from the swabs. At the request of Brandley's habeas counsel, these slides, which had been preserved, were sent to Lifecodes so that they could be subjected to newly developed DNA testing. The fact that Brandley presented no testimony at the evidentiary hearing regarding the results of the testing indicates that the material on the slides possessed no exculpatory value. In any event, the Second Circuit refused to find a due process violation, in a case presenting virtually indistinguishable facts, absence a showing of bad faith. *Colon v. Kuhlman*, 865 F.2d 29 (2nd Cir. 1988).

panties of the victim and from a mat found in the auditorium loft where her body was discovered. Scientific testing revealed sperm and blood factors A and H on the panties and the mat, consistent with the attacker having either type "A" or type "O" blood; testing for subgroups was inconclusive. Brandley has type "O" blood. Even sheer speculation cannot yield a conclusion that the swabs might have yielded evidence favorable to Brandley, much less evidence that might be expected to play a significant role in his defense. Brandley's lack of access to the swabs, therefore, was not a violation of due process.

Finally, the court below found that the State failed to disclose to the defense that Cheryl Bradford informed the police that she saw two white men rushing through the high school gymnasium near the time Cheryl Fergeson disappeared[9]. However, the unrefuted testimony at the evidentiary hearing establishes that the place where Bradford saw the two

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[9]The majority states that Bradford's "descriptions of the two men matched the height, weight and hair color characteristics of the pair now accused by Sessum as having committed the murder, Gary Acre.man and James Dexter Robinson." *Ex parte Brandley*, 781 S. W.2d at 891 (Appendix A at A-10). In making this assertion, the 2majority has flatly misstated the record. The *only* description gi$ven by Bradford of either of the two men was that *one* of them was "thin, average built." Evidentiary Hearing Transcript (R. VI - 102).

Brandley proffered this testimony and argued in his brief that the failure of the police to follow this "lead" (though who knows what the police were supposed to do with it) was evidence of an impermissible "blind focus" in the police investigation. The court below, however, found that this was exculpatory, that it was not disclosed to the defense, and that, therefore, Brandley's due process rights were infringed in contravention of *Brady v. Maryland*, 373 U.S. 83 (1963). *Ex parte Brandley*, 781 S.W.2d at 893 (Appendix A at A-14).

men was not near any place in the school that might permit access to the auditorium where Cheryl Fergeson's body was found. Even if the two men participated in the crime, the evidence still placed Brandley at the scene, apart from the other janitors, and Brandley admitted as much in his statement and grand jury testimony. Brandley was the only black man at the school who could have been the donor of the negroid hairs found on the deceased's body. By his own admission, Brandley was the only person at the school on the morning of the murder who had access to the locked auditorium in which the deceased's body was found. That someone else might have participated in the crime along with Brandley does not exculpate him and could not have provided an otherwise nonexistent reasonable doubt in the minds of jurors.

It is clear that the circumstances, even as represented by the majority, do not in any way satisfy the materiality criterion established by this Court in "access to evidence" cases. Although the Court of Criminal Appeals purported to apply a "totality of the circumstances" analysis, it did not even attempt to make a finding of materiality; rather, the majority leapt in a single bound from the conclusion that information or evidence was exculpatory to a finding that Brandley was entitled to relief. The majority made no attempt to explain how the disclosure to the defense of the evidence discussed above even remotely could have affected the outcome of Brandley's trial. Following *Ex parte Brandley*, it appears that in Texas, the cumulation of meritless claims can equate to a due process violation. The utter failure of the Court of Criminal Appeals to apply the analysis required by this Court in evaluating "access to evidence" claims requires reversal of its decision and provides a compelling reason for this Court to exercise its certiorari jurisdiction.

B. The Due Process Clause requires only a fair investigation, not a flawless one.

Apparently recognizing that Brandley was not entitled to relief under established due process theories, the Court of Criminal Appeals imposed upon the State, pursuant to an overly broad interpretation of the Due Process Clause, an obligation to conduct a pretrial investigation that does not focus solely on the accused to the exclusion of other leads or suspects, *regardless* of the fact that the great weight of the available evidence points only to the accused. This interpretation has apparently created a new category of due process error which can be characterized as "ineffective assistance of police."[10] This Court, however, has consistently held that the Due Process Clause has limited operation, and that the category of infractions that violate the concept of "fundamental fairness" should be defined very narrowly. *Dowling v. United States*, ___ U.S. ___, ___, 110 S.Ct. 668, 674 (1990).

> Judges are not free, in defining "due process," to impose on law enforcement officials their "personal and private notions" of fairness and to "disregard the limits that bind judges in the judicial function."

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[10]As succinctly noted by Judge Campbell in his dissent, "[b]y discussing these points the majority does not clarify this case by providing circumstantial evidence of a generally slipshod investigation. Instead, it changes the opinion's focus from whether the pretrial investigative procedures were constitutional to whether they were, in some subjective sense, 'good.' Our duty is neither to castigate nor praise the State's investigation in this case. Our job is limited to looking for constitutional error." *Ex parte Brandley*, 781 S.W.2d at 918 n.5 (Campbell, J., dissenting) (Appendix A at A-81).

United States v. Lovasco, 431 U.S. 783, 790 (1977), *quoting Rochin v. California*, 342 U.S. 165, 170 (1952).

The basic underpinning of the decision of the majority of the court below is that, in its opinion, the police could have and should have done a better job than they did. This holding, indeed this perception, is a classic example of judges "impos[ing] on law enforcement officials their 'personal and private notions' of fairness," conduct condemned by this Court in *Dowling*, *Lovasco*, and *Rochin*. An inept, incomplete, incompetent, or otherwise "flawed" investigation, however, invariably benefits the defendant, not the State. The failure of the police to investigate potential leads or to conduct available scientific tests on physical evidence is a circumstance that can be effectively exploited, and was exploited in Brandley's trial, in an effort to create reasonable doubt.

The Court of Criminal Appeals attempts, inappropriately and unsuccessfully, to relate the alleged failings of the investigation and the alleged resulting "blind focus" to the decisions of this Court relating to impermissibly suggestive lineups, *e.g.*, *Foster v. California*, 394 U.S. 440 (1969), and the government's knowing use of or failure to correct perjured testimony, *e.g.*, *Napue v. Illinois*, 360 U.S. 264 (1959); *Mooney v. Holohan*, 294 U.S. 103 (1935). However, nothing in the record of this case implicates any of these principles.

The only decisions of this Court that are even arguably implicated by the perceived deficiencies of the investigation in this case are *Youngblood* and its predecessors, *e.g.*, *California v. Trombetta*, 467 U.S. 479 (1984), which hold, in essence, that the failure to preserve evidence, and arguably by implication to col-

lect it in the first place, *see e.g. Miller v. Vasquez*, 868 F.2d at 1120 (following *Youngblood*, state's good faith failure to collect potentially exculpatory evidence does not violate due process); *Johnson v. Pittman*, 731 F.2d 1231, 1234 (5th Cir. 1984) (State under no constitutional duty to pursue every possible avenue of investigation potentially favorable to the defense), does not violate due process unless the defendant demonstrates by means other than speculation that such evidence is exculpatory and that bad faith police conduct resulted in its unavailability. Neither of these tests is met by the facts relied upon by the Court of Criminal Appeals in this case.

The evidence developed in the early phases of the investigation of Cheryl Fergeson's rape and murder immediately pointed to Brandley as the perpetrator. As the Court of Criminal Appeals noted in its opinion on the direct appeal of Brandley's conviction, the evidence did not even "*suggest* that someone other than [Brandley] committed the offense." *Brandley v. State*, 691 S.W.2d at 704 (emphasis in original) (Appendix D at D-8). Indeed, Brandley's own statements to the police, his testimony before the grand jury that returned the indictment against him, and his testimony at his first trial that ended with a deadlocked jury (all part of the record that *Agurs* requires a reviewing court to consider), establish that there was never any reason for the police to consider that other janitors who were present at the school on the morning of the murder had anything to do with the crime. Brandley's own statements indicate that he was the only person, at the time of the crime, who was in the area of the building where the victim was murdered, and that he was the only person at the school at the time of the crime who had keys to the locked auditorium where the body was found. Additionally, negroid hairs matching Brandley's were

found on the victim's body; Brandley was the only black man identified as having been anywhere near the scene of the crime. All of the other janitors who were working with Brandley were out of the building at the time of the crime, according to not only their statements but Brandley's statements and sworn testimony as well.

In light of these circumstances it was perfectly reasonable for the police to have "focused" on Brandley to the exclusion of other potential suspects. While it might have been possible for the investigation to have tied up every conceivable loose end, nothing in this Court's precedent requires such an undertaking. In this case, none of the "leads" that the court below urges police should have pursued could objectively have been expected to uncover evidence that might play a significant role in Brandley's defense.[11] *See Trombetta*, 467 U.S. at 488-89. *Youngblood* and its predecessors

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[11]At best, the presence of a caucasian hair on the victim's body, along with hairs matching Brandley's, suggests that Brandley was not the only participant in the rape and murder of Cheryl Fergeson. That inference, even if credited by a fact finder, does not lessen Brandley's guilt or exculpate him in any way. As discussed above, although vaginal swabs were not retained and were not subjected to testing that could reveal the blood type of the donor, other physical evidence from the scene, including the victim's underwear, was subjected to such testing. Those tests were consistent with the assailant having Type "O" blood, and Brandley's blood is Type "O."

Likewise, Cheryl Bradford's statement--that she saw two white men, one of whom she could very generally describe with respect to build, walking quickly through the high school gymnasium--is not exculpatory to Brandley. Any failure of the police to perceive the remote exculpatory value of Bradford's information was not unreasonable. Certainly, Bradford's statement was not material in any constitutional sense; the information available to the police uniformly revealed, without contradiction even from Brandley, that Brandley was the only person who had access to the locked auditorium where the victim's body was found.

teach that, in the absence of bad faith, the human failings of police do not provide a basis for a reviewing court to find a due process violation.

III.

THE COURT BELOW ERRED BECAUSE ITS RULING AMOUNTS TO A "NEW" CONSTITUTIONAL RULE, WHICH MAY NOT BE ANNOUNCED ON COLLATERAL REVIEW.

This Court has held that, with two limited exceptions, "new" rules of federal constitutional law are not to be announced or applied on collateral review of a conviction. *Penry v. Lynaugh*, 492 U.S. ___, ___, 109 S.Ct. 2934, 2944 (1989) (capital case). A decision announces a "new" rule, for retroactivity purposes, "'if the result was not *dictated* by precedent existing at the time the defendant's conviction became final.'" *Id.*, *quoting Teague v. Lane*, 489 U.S. ___, ___, 109 S.Ct. 1060, 1070 (1989) (emphasis in original). This principle ensures that "reasonable, good faith interpretations of existing precedents made by state courts" are validated, even though the interpretations ultimately conflict with later Supreme Court decisions. Thus, a case announces a new rule even if the outcome is "governed" by, or within the "logical compass" of, existing precedent, unless the result was so dictated by existing precedent that reasonable jurists would not disagree with the result. *Id.*; *Butler v. McKellar*, ___ U.S. ___, ___, 110 S.Ct. 1212, 1217 (1990).

As discussed above, the decision of the court below applied a new rule of federal constitutional law by imposing upon the State an unprecedented obligation to pursue and disclose to the defense all "leads," and to collect, scientifically test, and preserve all evidence; the scope of this obligation is not limited by

any consideration of materiality, bad or good faith police conduct, or even reasonableness. The holding of the Court of Criminal Appeals conflicts with the decisions of this Court, and it certainly was not dictated by precedent existing at the time Brandley's conviction became final.[12] *E.g.*, *California v. Trombetta*, 467 U.S. at 489 (To meet materiality standard limiting government's duty to preserve evidence, "evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means."); *accord United States v. Dela Espriella*, 781 F.2d 1432 (9th Cir. 1986) (applying *Trombetta* materiality criterion); *Johnson v. Pittman*, 731 F.2d 1231 (5th Cir. 1984) (State under no constitutional duty to pursue every possible avenue of investigation potentially favorable to the defense); *United States v. Hoppe*, 645 F.2d 630 (8th Cir. 1981) (absent showing of bad faith, case agent's destruction of original version of her notes did not violate due process); *United States v. Wander*, 601 F.2d 1251 (3rd Cir. 1979) (FBI agent's destruction of evidence not violative of due process because the defendant failed to demonstrate the materiality of the destroyed evidence).

Although the Constitution neither mandates nor proscribes retroactive application of new constitutional rules, *Linkletter v. Walker*, 381 U.S. 618, 629 (1965), this Court's determination of the retroactivity question is binding upon state courts. For example, in *Griffith v. Kentucky*, ___ U.S. ___, 107 S.Ct. 708 (1987), the Court determined that *Batson v. Kentucky*, 476 U.S. 79

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[12]Brandley's conviction became final on August 5, 1985, when the time for petitioning for certiorari review of his direct appeal expired. *Allen v. Hardy*, 478 U.S. 255, 258 n.1 (1986). Brandley's conviction was affirmed on direct appeal on May 8, 1985, with rehearing denied on June 6, 1985 (Appendix D).

(1986), should retroactively apply to all defendants whose convictions were not final at the time *Batson* was decided. Because Griffith's conviction was not final, the Court remanded his case to the Supreme Court of Kentucky so that his claim of prosecutorial discrimination in the use of peremptory challenges could be analyzed under the new *Batson* standard.

Likewise, a state court should not be free on collateral review to apply a new rule of federal constitutional law, where neither this Court nor any other federal court could retroactively apply that rule. Such a situation would violate "the principle of treating similarly situated defendants the same." *Griffith v. Kentucky*, ___ U.S. at ___, 107 S.Ct. at 713. Further, the new rule of federal constitutional law is itself an unwarranted federal intrusion, whether imposed by a federal court or by a state court under the constraints of its interpretation of federal constitutional principles. The state courts are free, of course, to retroactively apply state constitutional and statutory provisions in a manner that affords greater protection than the federal Constitution; but in the instant case, the Court of Criminal Appeals was not presented with and did not decide a claim under state law.

The new rule applied by the court below does not place certain conduct or persons beyond the government's power to proscribe or punish. *See Penry v. Lynaugh*, 492 U.S. at ___, 109 S.Ct. at 2952. Likewise, the new rule announced by the Court of Criminal Appeals does not constitute a bedrock procedural rule that is necessary to ensure fundamental fairness or accurate factfinding. *See Teague v. Lane*, 489 U.S. at ___, 109 S.Ct. at 1077. Indeed, by imposing upon the State an obligation to pursue certain "leads" and collect and preserve certain evidence, without regard to any of the materiality standards typically applied in access to

evidence cases, the court below announced a new rule that goes far beyond what is necessary to ensure an accurate and fundamentally fair trial. Hence, the "new" rule of federal constitutional law announced and applied in Brandley's state habeas proceeding should not have been given retroactive application in that collateral attack on a final conviction.

CONCLUSION

For these reasons, the State respectfully requests that the writ of certiorari to the Court of Criminal Appeals issue.

Respectfully submitted,

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